

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level
Determination of Anthony L. Nelson

ORDER

By a written motion filed April 11, 1997, Anthony L. Nelson ("Mr. Nelson") has filed a motion seeking an order closing the administrative hearing in this matter to the public and sealing the record. The End of Confinement Review Committee ("Review Committee") submitted a written response to the motion on April 17, 1997.

Mr. Nelson is represented by Ronald H. Ortlip, Esq., Legal Advocacy Project, 2829 University Avenue S.E., Suite 600, Minneapolis, Minnesota 55414. The Review Committee is represented by Theresa M. Couri, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

- (1) The hearing shall be closed to the general public.
- (2) The hearing record in this matter is "Not Public".
- (3) The victim or victims and the law enforcement agency or their designees may attend the hearing if they elect to do so.
- (4) This Order is public.

Dated this 18th day of April 1997.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Anthony Nelson appeared before the Review Committee at the Moose Lake facility and was classified at a Risk Level II under the Minnesota Community Notification Act. Minn. Laws 1996, Ch. 408, Art. 5. Mr. Nelson is a sex offender within the meaning of the Act, who is scheduled to be released from the correctional facility. Mr. Nelson has exercised his right for an administrative review of the End of Confinement Review Committee's risk assessment determination by requesting a hearing on the record before an Administrative Law Judge under Minn. Stat. § 244.052, subd. 6 (1996).

Mr. Nelson makes several arguments in support of his request that the hearing be closed or not public and that the record be sealed. He argues that a public hearing might incur greater notoriety than would have occurred through the statutory notification process, contrary to legislative intent, and resulting in a chilling effect on offenders' decisions to exercise their right to review. He also argues that some of the matters to be discussed in the hearing are classified as private or confidential under the Data Practices Act. He points out that matters discussed in the hearing may result in identification of the victim or victims. Lastly, since the review hearings are being conducted at the correctional facilities, security problems are created by allowing the general public to attend.

The Review Committee's response states that it takes no position on closing the hearing, but argues that the motion to close the hearing is premature since there is no indication that any member of the public wishes to attend the hearing. The Committee suggests that the argument of a person wishing to attend should be heard before a decision is made. Likewise, the Committee states that the record should not be sealed until private data is offered.

This hearing is conducted under the Administrative Procedure Act (Minn. Stat. §§ 14.001-14.69) and the Rules of the Office of Administrative Hearings (Minn. Rule pts. 1400.5100-8401). The general rule in contested case proceedings is that the hearings are public unless otherwise permitted or required to be closed. Minn. Rule pt. 1400.7800. The Community Notification statute is silent on whether or not the contested case proceeding is public. However, under Minn. Stat. § 14.60, subd. 2:

When the hearing record contains information which is not public, the Administrative Law Judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

Additionally, under Minn. Rule pt. 1400.6700, subp. 4, the Administrative Law Judge is authorized to make such protective orders as are reasonable and necessary.

It is the intent of the Office of Administrative Hearings to maximize the public nature of administrative proceedings and, where matters must be made not public, to employ the least restrictive limitation in each individual contested case. The general rule is that a party may waive a right to a public hearing, but that the party may not compel a private hearing. Singer v. United States, 380 U.S. 24, 35 (1965). While it might be preferable in some respects to delay deciding this motion as the Committee suggests, the offender's decision to proceed with the appeal is likely to be affected by a

decision on this motion. It is, therefore, appropriate to make this determination prior to the hearing. In this case, the subject of the hearing seeks to make it private and the motion is not opposed. However, since proceedings under the Community Notification Act are of public interest, it is not appropriate to close the hearing unless persuasive and compelling reasons are presented.

It will be difficult, if not impossible, for counsel to represent the interests of their clients adequately without frequent references to information that is classified by the Data Practices Act as private or confidential. A reasonable interpretation of Minn. Rule 1400.7800 would therefore seem to be that Minn. Stat. § 14.60, subd. 2, represents "a specific provision mandating or permitting a closed hearing" when it would be impracticable even to conduct an open, contested case hearing because of the continuing need for participants to make references to data that is protected against disclosure by the Data Practices Act. Since counsel argues that the record will be laced with data classified as private or confidential by the Data Practices Act, the Administrative Law Judge has ordered the record in this proceeding sealed under the authority of Minn. Stat. § 14.60, subd. 2.

Additionally, a public hearing appears to be incompatible with the legislative intent in establishing the Community Notification Act. The purpose of the Act is to provide members of the public "adequate notice" about a sex offender who is about to be released from custody. The Act sets out the method for determining how much notice is to be provided in each case. Sex offenders about to be released are classified at three levels based upon factors set out in the statute. Generally, if an offender is assigned to Risk Level I, a law enforcement agency may disclose notice of the offender's release to other law enforcement agencies as well as to victims or witnesses. At Risk Level II, the agency may also disclose the information to public and private educational institutions, day care establishments, and establishments and organizations that primarily serve individuals likely to be victimized by the offender. At Risk Level III, the agency may also disclose the information to "other members of the community whom the offender is likely to encounter."

Conducting a public hearing would render the statutory procedure meaningless since it would permit full public disclosure contrary to the procedure set out in the statute. No offender would be able to utilize the appeal procedure if it had the result of increasing public disclosure over that proposed by the Review Committee. Although the statute does not specifically provide for a closed hearing, it does recognize the need for privacy by, for example, requiring that data collected and maintained by the Review Committee may not be disclosed. Accordingly, although the Legislature has not specifically addressed the public or private nature of this proceeding, its intent cannot be implemented if the hearing in this matter is public. The record, which will contain evidence submitted at the hearing, will necessarily need to be classified "Not Public".

However, it is contemplated that the final decision of the Administrative Law Judge will be public since the statute contemplates the disclosure of information after a final decision is made on the appropriate risk level. Additionally, the parties will have the opportunity at the hearing to advise the ALJ of the existence of any evidence which the party believes cannot be made public in the final decision.

In order to permit security arrangements to be made for the hearing, it is necessary to require the victim or law enforcement agency or their designees to advise the Department of Corrections of their intent to attend the hearing. Whether or not they attend the hearing, each will receive a copy of the final decision.

G.A.B.